2004

BRITTNEY FENN, on behalf of herself, and all others similarly situated, Plaintiff and Appellee, vs. MLEADS ENTERPRISES, INC., and JOHN DOES one through ten whose true names are unknown, Defendants and Appellants : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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BRITTNEY FENN, on behalf of herself, and all others similarly situated,	Supreme Court Case No.: 20041072-SC
Plaintiff/Appellee,	Appellate Case No.: 20030948-CA
vs.	District Court Case No.: 030400108
MLEADS ENTERPRISES, INC., and JOHN DOES one through ten whose true names are unknown,	
Defendants/Appellants.	

APPELLEE'S OPPOSITION TO APPELLANTS' OPENING BRIEF

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* ORAL ARGUMENT REQUESTED

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LIST OF ALL PARTIES TO THE PROCEEDING BELOW

The Appellants:

MLeads Enterprises, Inc., and John Does one through ten whose true names are unknown ("Mleads").

The Appellee:

Brittney Fenn, on behalf of herself and all others similarly situated ("Fenn").

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JURISDICTION OF THE UTAH SUPREME COURT

The Utah Supreme Court has jurisdiction to review the decision the Utah Court of Appeals pursuant to Utah Code Ann. § 78-2-2(5).

QUESTION PRESENTED FOR REVIEW

1. Whether Appellant's purposeful email solicitation to a Utah citizen confers jurisdiction over a foreign defendant, as was found by the Utah Court of Appeals.

CONTROLLING STATUTES AND RULES

U.S. Const. amend XIV, § 1

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the priviliges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Code Ann. § 78-27-24. Jurisdiction over nonresidents -- Acts submitting person to jurisdiction.

> Any person, notwithstanding Section **16-10a-1501**, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising out of or related to:
>
> (1) the transaction of any business within this state;

(2) contracting to supply services or goods in this state;

(3) the causing of any injury within this state whether tortious or by breach of warranty;

(4) the ownership, use, or possession of any real estate situated in this state;

(5) contracting to insure any person, property, or risk located within this state at the time of contracting;

(6) with respect to actions of divorce, separate maintenance, or child support, having resided, in the marital relationship, within this state notwithstanding subsequent departure from the state; or the commission in this state of the act giving rise to the claim, so long as that act is not a mere omission, failure to act, or occurrence over which the defendant had no control; or

(7) the commission of sexual intercourse within this state which gives rise to a paternity suit under Title 78, Chapter 45a, to determine paternity for the purpose of establishing responsibility for child support.

STATEMENT OF THE CASE

Nature of the Case:

This case involves the sending of an unsolicited commercial email by MLeads Enterprises, Inc. (Defendant/Appellant/MLeads) to Brittney Fenn (Plaintiff/Appellee/ Fenn) in violation of Utah law, for which Fenn brought this action in accordance with the Unsolicited Commercial and Sexually Explicit Email Act found in Utah Code Annotated §§ 13-36-101 to 13-36-105 (2002) (the "Statute"). The Court of Appeals found MLead's actions to be sufficient to subject them to the long arm jurisdiction of this State. The Court of Appeals based this decision upon the finding that MLeads' actions fulfilled all

requirements to subject it to jurisdiction and therefore the requisite contacts existed. See *Fenn v. MLeads Enterprises, Inc.*, 2004 UT App. 412. (See Decision at Appendix A).

Course of Proceedings and Disposition Below:

Fenn filed this action in the Third District Court, Sandy Division on January 3, 2003 alleging that MLeads sent or caused to be sent to Fenn an unsolicited commercial email in violation of the Utah Statute. *See* Court Record (Ct. Rec.) p. 1-4. On April 4, 2003, MLeads filed its Motion to Dismiss for Lack of Personal Jurisdiction, with supporting memoranda and the Affidavit of Shay Tyler. See Ct. Rec. p. 8-32. On April 16, 2003, Fenn filed her memorandum in opposition to motion to dismiss. Ct. Rec. p. 53-64. Defendant filed it's reply memorandum on April 21, 2003. See Ct. Rec. p 65-72.

Without hearing, the lower court entered it's Memorandum Decision and Order Granting Defendant's Motion to dismiss on Jurisdictional Ground on October 14, 2003. See Ct. Rec. p. 84-91. The lower court found that there was not proper jurisdiction and therefore granted Defendant's motion to dismiss. See Ct. Rec. p. 84-91.

Fenn filed her Notice of Appeal on November 14, 2003 (Ct. Rec. pp. 95-97) with the Utah Supreme Court which subsequently transferred this matter to the Court of Appeals. After briefing, argument was heard by the Court of Appeals, who filed and published their opinion on November 12, 2004. A copy of that opinion is attached hereto as Appendix A. Appellants petitioned this Court for certiorari, which was granted.

Facts established in the Record below:

1. On or around August 28, 2002, Ms. Fenn received an unsolicited email sent by or at the behest of Defendant. The email advertised an opportunity for a free quote on a home mortgage refinance. See Ct. Rec. p. 4.

2. The email did not have the characters: "ADV:" on the subject line. See Ct. Rec. p. 4.

3. Ms. Fenn has never had any business or personal relationship with MLeads Enterprises, Inc.. See Ct. Rec. p. 55.

4. MLeads generates leads with respect to loans to purchase property, and then transmits those leads on a bulk basis to financial institutions who then work with customers to provide loans. See Ct. Rec. p. 29.

5. These leads are generated by sending commercial emails. See Ct. Rec. pp. 4, 29, 55.

6. MLeads never denied sending the email sent to Brittney Fenn, rather they admit to having sent or caused it to be sent. See Ct. Rec. p. 29-30.

7. MLeads advertises in the State of Utah. See Ct. Rec. pp. 4, 29, 55.

8. Mleads transacts, or attempts to transact business in the State of Utah. See Ct. Rec. pp. 4, 29, 55.

SUMMARY OF ARGUMENTS

1. Jurisdiction is properly found against the Defendant in this case by Utah's long-arm statute, found in § 78-27-24 of the Utah Code, because there are sufficient minimum contacts and subjecting Defendant to jurisdiction where it sends its emails does not offend "traditional notions of fair play and substantial justice." Jurisdiction should therefore be properly found in this case. The well-reasoned opinion of the Court of Appeals should be affirmed.

ARGUMENT

I. A Finding of Personal Jurisdiction Over the Defendant Was Proper in this Instance.

"To exercise jurisdiction, (i) a Utah statute must permit the court to exercise jurisdiction, and (ii) the exercise of jurisdiction must 'comport [] with due process requirements of the Fourteenth Amendment.'" *Fenn v. Mleads*, 103 P.3d 156, 160 (Utah 2004) (citations omitted). The Utah Supreme Court clarified the requirements for finding personal jurisdiction over a foreign defendant in Utah in, *State ex rel. W.A.* 2002 UT 127. In that decision the Utah Supreme Court explained that:

> "The proper test to be applied in determining whether personal jurisdiction exists over a nonresident defendant involved two considerations. First, the court must assess whether Utah law confers personal jurisdiction over the nonresident defendant. This means that a court may rely on any Utah statute affording it personal jurisdiction, not just Utah's long-arm statute. Second, assuming Utah law confers personal jurisdiction over the nonresident defendant, the court must assess whether an assertion of jurisdiction comports with the due process requirements of the Fourteenth Amendment."

Id. at ¶ 14. Defendant's actions subject it to jurisdiction through Utah's long-arm statute. Utah's long-arm statute is found in Section 78-27-24 of the Utah Code Ann. and provides in relevant part that:

> "Any person,... whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdictions of the courts of this state as to any claim arising out of or related to:
>
> (1) the transaction of any business within this state; ...

(3) the causing of any injury within this state whether tortious or by breach of warranty[.]"

Utah Code Ann. §§ 78-27-24(1), (3). The "transaction of business within this state" is defined as "activities of a nonresident person, his agents, or representatives in this state which affect persons or businesses within the state of Utah." Utah Code Ann. § 78-27-23(2). "The Utah Supreme Court has applied a 'liberal and expansive construction' to the statutory definition of transacting business." *Patriot Systems, Inc. v. C-Cubed Corp.*, 21 F. Supp. 2d 1318, 1323 (D. Utah 1998) (*citing Nova Mud Corp. v. Fletcher*, 648 F.Supp. 1123, 1126 (D. Utah 1986)). The Utah Supreme Court has long held that the Utah long-arm statute, "must be extended to the fullest extent allowed by due process of law." *Synergetics v. Marathon Ranching Co. LTD.*, 701 P.2d 1106, 1110 (Utah 1985). Defendant's actions clearly place it within the reach of this statute. Just with a review of the email and website directed to by the email, it was obvious to the Court of Appeals that it has attempted to obtain new Utah customers, including and especially Ms. Fenn. The Defendant was doing business by making the solicitation at issue here.

Additionally, the placement of the offending email was entirely commercially driven and meant to transact business within the state. See Ct. Rec. p. 32, 54-59. This alone should be enough to subject the Defendant to personal jurisdiction within this state. There has been no denial that the email was sent to and received by at least the named plaintiff in the State of Utah. The nature of the offending email was entirely commercial. See Ct. Rec. p. 54-59. This also is not in dispute. This fact alone places the Defendant and its actions within the

reach of the long-arm statute. In addition, however, Mleads does or attempts to do business in the State, as the Court of Appeals found.

Furthermore, because long-arm statutes typically extend to the limits of due process, the Court need only consider whether exercising jurisdiction over defendants would be consistent with the Due Process clause of the Fourteenth Amendment. See Utah Code Ann. § 78-27-22. The Court of Appeals relied upon the four-part analysis applied in the recent case of *MFS Series Trust III v. Grainger*, 2004 UT 61, 96 P.3d 927 (Utah 2004). "First, the court considers if the defendant "'purposefully availed itself of the privilege of conducting activities within the forum state.'" *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)) (other citation and alteration omitted). Second, the court considers whether the claim arose out of the defendant's Utah activity. See *id.* (citing *Neways, Inc. v. McCausland*, 950 P.2d 420, 423 (Utah 1997)). Third, the court considers if the defendant "should [have been able to] reasonably anticipate being haled into court" in Utah. *Id.* (citing *Synergetics*, 701 P.2d at 1110) (other citation omitted). Finally, the court considers the state's interest and "fairness" to the parties. *Id.* A review of each of these factors by the Court of Appeals confirmed that personal jurisdiction over this defendant was proper.

Having found that the claim specifically arose out of Utah activity, the Court of Appeals addressed all but the second factor listed above. Appellant has only argued that the facts of this situation do not rise to purposeful availment and that the exercise of jurisdiction

would be contrary to their notion of "fairness," or that the first and last factor were incorrectly determined by the Court of Appeals. Each of those will be addressed below.

A. Appellant Purposefully Availed Itself of Utah Jurisdiction.

Appellant first disputes that it purposefully availed itself of Utah jurisdiction. The Court of Appeals repeated that "a state may exercise jurisdiction only against a defendant who has "purposefully directed his activities at residents of the forum." See *Fenn*, 2004 Ut. App. 412, at ¶ 17 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (omitting other quotations and citations)).

Appellant argues that it could not have purposefully directed its activities to Utah. That however, flies in the face of the limited facts of this case. What is known is that MLeads pays marketers to advertise their services over the internet through the sending of emails. What is further known is that Ms. Fenn received a violating email from the Defendant, at her home computer in Utah, that was addressed to her email address. Mleads argues that was merely fortuitous, and not purposefully directed. The United States Supreme Court has maintained that a defendant's activities will be deemed "purposefully directed" when a corporation placed products in "'the stream of commerce with the expectation that they will be purchased by consumers in the forum State' and those product subsequently injured consumers." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980)). That same argument was made by Defendant before the Court of Appeals as well. The Court of

Appeals disagreed with that argument. It found rather, that MLeads did not simply just place a product into the stream of commerce, but rather they caused the communications to come into Utah by causing "its agent to send email, and the agent sent an email to Fenn, who is a resident of Utah." *Fenn*, 103 P.3d at 162. The direction was admittedly given to send out these commercial emails and to solicit business, which their agent did. *Id.* That is enough for purposeful availment. They intended to solicit Fenn to do business, and had she responded favorably (as undoubtedly many Utah residents have done before) they would have done business with her. They *wanted* Utah business. They were attempting to obtain it. To that end they intentionally solicited Utah residents, including Fenn, to get loans through them.

Purposeful availment has been found where a corporation placed products in "'the stream of commerce with the expectation that they will be purchased by consumers in the forum State' and those products subsequently injure[d] consumers." *Id.* at 473 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980)). Where a publisher distributed a defamatory story in the forum. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984); *see also Calder v. Jones*, 465 U.S. 783 (1984)). Where defendants allegedly made defamatory statements to individuals in Utah and caused libelous facsimiles to be sent to Utah. *See Starways*, 1999 UT 50 at ¶¶ 5, 12. "Moreover, email contacts alone can establish jurisdiction when the contacts are extremely numerous." See *Fenn*, 203 P.3d at 161 (citing *Verizon Online Servs., Inc. v. Ralsky*, 203 F. Supp. 2d 601

(E.D. Va. 2002); *Internet Doorway, Inc. v. Parks*, 138 F. Supp. 2d 773 (S.D. Miss. 2001) (involving millions of email); *Washington v. Heckel*, 93 P.3d 189, 193 (Wash.Ct.App. 2004) (involving millions of email but not directly addressing personal jurisdiction)).

The *Fenn* Court directly found that "MLeads did cause the communications to come into Utah." See *Fenn*, 2004 Ut. App. 412, at ¶ 21. And that MLeads caused its agent to send email, and the agent sent an email to Fenn, who is a resident of Utah. *Id.* MLeads directed its agent to solicit business, and that direction instantiates the purpose that makes the connection more than an "attenuated nexus." *Id.* Furthermore, the U.S. Supreme Court evaluated this issue in *Asahi Metal Indus. Co., Ltd., v. Superior Court of California*, 480 U.S. 102 (1987). In that case, the U.S. Supreme Court stated:

> "The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, **advertising in the forum State, establishing channels for providing regular advise to customers in the forum State, or marketing the product through a distributor who has agreed to serve as a sales agent in the forum State.**"

Id. at 107 (emphasis added). This is exactly what defendant's email was: advertisements in solicitation of commercial transactions. See Ct. Rec. p. 4, 29, 59, 88. The U.S. Supreme Court used that as evidence of purposeful availment in *Asahi*, and it was properly found to be evidence of the same by the Court of Appeals in this case.

Nevertheless, Appellant argues that the finding was incorrect. Appellant's argument is based upon the finding by this Court in *MFS Series Trust III, et al. v. Grainger*, 2004 UT

61, 96 P.3d 927 (Utah 2004), that individual corporate officers and directors were not subject to personal jurisdiction based upon acts of the corporation because their personal involvement was "speculative." See Appellant's Petition for Writ of Certiorari, p. 11. That argument, however is not applicable here. In this case, it was more than speculation that Appellant caused the email to be sent, it was in fact admitted. See Ct. Rec. p. 29-30. It was sent for the purpose of soliciting business, and without following the requirements of Utah's Anti-Spam act. See Ct. Rec. p. 4, 55. It was them who did it. It was therefore correctly found that they purposefully availed themselves of this State's jurisdiction.

Appellant relies upon several District Court cases in an effort to support their proposition that there were not sufficient contacts in this case, namely *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 297 F.Supp. 2d 1154 (D. Wis. 2004) and *Design88 Ltd. v. Power Uptik Prods.*, 2000 U.S. Dist. LEXIS 21042 (D. Va. 2000). See Appellant's Opening Brief, p. 15-16. In each of those cases, the court was considering jurisdiction based upon the actions of an actual website. *Id.* This case is different. In this case, MLeads, although they maintain a website, is not involved because of their maintenance of a website, but rather, they are involved because they sent an illegal email directly to a Utah resident. Where in *Hy Cite* and *Design88*, the controversy arose because a website was out there and doing what the Plaintiff believed was offensive, in this case, it was MLeads who actually took the initiative and delivered the offending email to Ms. Fenn's home computer. In the *Hy Cite* case the complaining party went to the website. Here, the Defendant came to Fenn.

The Court of Appeals appropriately made that distinction in finding jurisdiction to be proper in this case. That was not error, and should not be reversed.

MLeads further argues that it has no ability to differentiate from what location in the world an e-mail will be accessed. See Appellant's Opening Brief, p. 18. That is just not true, Before sending an email, it certainly can require information regarding the location of the main residence for potential recipients prior to sending out their emails. It would not take much to do so. MLeads argues that Fenn could have accessed her email anywhere. The reality of the situation is, however, that Fenn is a resident of Utah and she accessed her email at her home computer in Sandy, Utah. The Court of Appeals dealt directly with this argument as well. It stated that "[s]ending an email to a forum requires more purpose than maintaining a passive internet website, however. Thus, MLeads should have anticipated being haled into court wherever its email were received, even in Utah." *Fenn*, 103 P.3d at 162. MLeads was not simply placing their advertisement out into a stream of commerce like in *Asahi*, or even like in *Calder v. Jones*, rather they purposefully sent their solicitation directly to Ms. Fenn at her address. While it is unknown how many other emails they sent or continue to send, at the very least, it is known that they sent one directly to Ms. Fenn in Sandy, Utah. They should have anticipated being haled into court here.

B. The Email was Purposefully Sent to Fenn.

The sending of the email to Ms. Fenn was not random. As admitted by Appellants, the email was sent directly to a specific address. The email was not randomly placed on an

Internet Website, or randomly distributed nationwide by fax, it was sent directly to a specific email address, to a specific location, here in Utah. That is distinguishable from the cases relied upon by Appellants to support their assertion of randomness. See *Starways v. Curry*, 1999 UT 50 (1999).

Appellant next argues that facts of this matter do not fit within the "effects test" of *Calder v. Jones*, 465 U.S. 783 (1984). In that case, a California resident sued a Florida resident in a California court for publishing libelous information in a publication that was nationally circulated. *Id.* Personal jurisdiction was found in that case. *Id.* In this case, a Nevada corporation hired a Florida based company to send solicitous emails, presumably, all over the country, but certainly into Utah. The number and direction of the emails sent by Appellant are not known in total, but probably number at least in the tens-of-thousands. What is known and applicable to this matter is that one of them was directed to Fenn, who is a Utah resident. The emails did not comply with the Utah statute existing at the time. In this case, the effects were purposeful and directed, and they were not random or fortuitous.

Appellant argues that it was merely fortuitous that Fenn received that email in Utah. That however, is either untrue or should have been subject to further discovery since it involves a question of fact. The district court did not allow Fenn to perform any discovery. The email itself was addressed directly to Fenn's email address. The facts known to the Court at this point are that it was not sent to millions of other recipients, as is probably the case, without impetus, but rather that it was specifically addressed and sent to Fenn, and it

did not comply with Utah statutes. That is different from the facts of *Calder v. Jones*, where through fortuitous circumstances, the National Enquirer article landed in Jones' home state. *Id.*

The Court of Appeals specifically held that "MLeads directed its agent to solicit business, and that direction instantiates the purpose that makes the connection more than an "attenuated nexus." Seemingly more applicable are the findings of courts that have dealt with the issue of jurisdiction arising from contacts over the internet. Courts in Utah have acknowledged that "a website may form the basis of personal jurisdiction." *iAccess, Inc. v. WEBcard Technologies, Inc.*, 182 F. Supp. 2d 1183, 1186 (D. UT 2002). Courts have also found that "[e]ven a single contact can support specific jurisdiction." *American Eyewear, Inc. v. Peeper's Sunglasses and Accessories, Inc.*, 106 F. Supp. 2d 895, 900 (N.D. Tex. 2000). The emails sent by the defendant to the plaintiff's email address are obvious solicitations to do business. *Id.* "Personal jurisdiction, however, is established where a 'defendant clearly does business over the Internet[.]'" *iAccess* at 1187 (citing *Zippo Mfg. Co. v. Zippo Dot Com, Inc.* 952 F. Supp. 1119, 1124 (E.D. Pa. 1997)).

In this case, Defendant clearly was attempting to do business over the Internet and in Utah. See Ct. Rec. p. 4, 29, 59, 88. The email sent to plaintiff was a direct and obvious solicitation to do business addressed to and received by a Utah resident and personal jurisdiction was correctly found by the Court of Appeals.

It is unknown the amount of business the Defendant carries on with other Utah residents. What is known is that they at least solicit business from Utah residents. See Ct. Rec. p. 4, 29, 59, 88. Even if the amount of business Defendant does is small, courts have used a relatively low threshold to find personal jurisdiction when any business is found. The 6th Circuit Court in *CompuServe, Inc. v Patterson*, 89 F.3d 1257 (6th Cir. 1996), granted personal jurisdiction over a Texas defendant, even though he had claimed he had never been to Ohio, and had "sold less than $650.00 worth of his software to only (twelve) Ohio residents" over the Internet. Without discovery in this case, the Court will never know if Defendant's sales approach those in *CompuServe.* Additionally, the only facts given before the lower court are that "MLeads does not generate any substantial (i.e., over one percent (1%)) percentage of its revenues from activities in the State of Utah." See Ct. Rec. p. 31, ¶ 16. That statement does not provide any relevant information as the percentage of revenue is certainly relative to the amount of revenue actually brought in. One percent of a million dollars is certainly a substantial amount of revenue. As Defendant is soliciting wares for one of the currently most successful areas (mortgage refinancing) of business, it could easily arise to revenues greater than one million dollars. That information is not available, and would not be available without discovery, which was not permitted by the lower court. It was error for the trial court not to find minimum contacts. Or, alternatively, for the lower court to deny any discovery if this is material to a decision of the matter.

Even in the event the Court does not find Defendant's actions to be commercial, there is also a middle category of websites, which Courts have also found meet the requirements for personal jurisdiction. This category is known as "interactive" website. These are websites "where a user can exchange information with the host computer." *Id.* at 1187. If the actual website maintained by the Defendant is not commercial in nature, it is at least interactive, as shown by the email sent by the Defendant to the Plaintiff. See Ct. Rec. p. 4. As is readily discerned, just from the copy printed and provided as an exhibit for the complaint, there is an obvious offer to do business. *Id.* The entire purpose of the email is to solicit the sale of a product sold by the Defendant from Utah residents. *Id.*

Courts have found jurisdiction over the operator of a website when not a single sale was made within the forum state. See *Starmedia Network, Inc. v. Star Media, Inc.*, 2001 U.S. Dist. LEXIS 4870 (S.D.N.Y. Apr. 23, 2001). In *Starmedia*, the court found that even though customers could not purchase products through the defendant's website, they "could register with the site and use the site to send comments to defendant." *Id.* at 1. This is similar to the Defendant's offending email. The commercial message sent solicits the sale of Defendant's product through clicking on a certain area which would carry the user to the Defendant's website for purchase of the product. See Ct. Rec. p. 85. The entire purpose of the message is to solicit the sale of Defendant's products. *Id.*

Courts have also found personal jurisdiction appropriate where just one email was sent. A Mississippi court recently found jurisdiction from the sending of just one email. See

Internet Doorway, Inc. v. Parks, 138 F.Supp. 773 (S.D. Miss. 2001). The court in that case subjected the defendant, who maintained a "passive" web site, to personal jurisdiction. *Id.* The court stated that "the medium in the instant case is an e-mail, which as actively sent to the recipient in hopes that the recipient would read its contents and patronize the Web site it was promoting." *Id.* at 777. The court held that the injury occurred in Mississippi, when the e-mail was received and opened. *Id.* In analyzing whether the fairness and due process rights of the defendant, the court reasoned that, in sending the e-mail advertisement all over the world, the defendant:

> "had to have been aware that the e-mail would be received and opened in numerous fora, including Mississippi. Accordingly, the Court finds that it would ne neither "unfair" nor "unjust" to subject her to personal jurisdiction in Mississippi. **By sending an e-mail solicitation to the far reaches of the earth for pecuniary gain, one does so at her own peril, and cannot then claim that it is not reasonably foreseeable that she will be haled into court in a distant jurisdiction to answer for the ramifications of that solicitation**."

Id. at 779-80 (emphasis added). This is exactly what the Defendant has done in this situation. The solicitation would be and probably has been sent to computer terminals all over the world, including to other Internet users in Utah. It was done for pecuniary gain. Therefore, it has been done at Defendant's own peril and now it "cannot then claim that it is not reasonably foreseeable that [he] will be haled into court in [Utah]." *Internet Doorway* at 780. The Court of Appeals correctly found that jurisdiction was proper under these circumstances.

C. The Exercise of Personal Jurisdiction Does Not Offend "Traditional Notions of Fair Play and Substantial Justice."

Appellant lastly argues that it is not fair for them to have to defend this lawsuit in the jurisdiction where they caused their solicitation to be sent. That argument seems to directly contradict the intent of the Utah legislature. Why pass a statute that could not be enforced? Appellant argues that the fact that the statute has since been repealed is an indication that this state does not have any substantial interest. That argument is only spin. The statute was repealed in 2004 (see Utah Repeal of Unsolicited Commercial or Sexually Explicit Email Act, ch 278, § 1, 2004 Utah Laws 278), however, that came only as a result and as a result of the adoption of the federal CAN-SPAM Act of 2003. 15 U.S.C. § 7701, *et seq.* not the vice versa. That does not show a diminished state interest, in fact, if anything it shows an increased interest so broad in scope that the federal government is making an effort to control spam. At the time of the adoption of the federal statute, there were growing numbers of states adopting anti-spam legislation. This virulent form of advertising was so pernicious that Virginia made it a felony, and California allowed damages up to $100,000.00. Utah was considering raising the damage award from $10.00 to either $500.00 or $1,000.00 at the time of the federal statute being passed. But federal preemption under the Supremacy Clause ended the states' efforts and federalized the campaign against spam. This does not reflect a diminished commitment to ending spam. Rather it shows a growing national consensus that this problem must be dealt with.

The determination of whether or not the exercise of personal jurisdiction offends traditional notions of fair play and substantial justice "requires a determination of whether the exercise of personal jurisdiction over the defendant with minimum contacts is 'reasonable' in light of the circumstances surrounding the case." *Rainy Day Books, Inc. v. Rainy Day Books & Café, L.L.C.*, 186 F. Supp. 2d 1158, 1162 (D.Kan. 2002). "This inquiry requires a determination of whether the ... court's exercise of personal jurisdiction over the defendant is reasonable in light of the circumstances surrounding the case." *Id.* at 1162 (citing *Burger King*, 471 U.S. at 476). To determine the reasonableness, the court will consider the following factors: "(1) the burden on the defendant; (2) the forum state's interest in resolving the dispute; (3) the plaintiff's interest in receiving convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies." *World-Wide Volkswagen*, 444 U.S. at 292.

Each of these factors was discussed and fully explored in the Court of Appeals decision. The Court of Appeals recognized that there was some burden associated with MLeads having to litigate this matter in Utah, (one state away). However, that burden was found to be much smaller to the burden on Fenn if this matter is dismissed and she is never able to bring any action because of the developments in the federal law. See *Fenn*, 103 P.3d. Appellant's main contention appears to be that the statute provides for only a $10.00 recovery. See Appellant's Opening Brief, p. 29-30. While that is true, it is additionally true

that there are other effects provided for by the statute for those that send offending emails, including a requirement to pay attorneys fees. These effects are intended to provide serious deterrents to those that send spam emails into this state. While it was recognized by the Court of Appeals that there is a burden associated with defending this action in Utah, that burden is far outweighed by the totality of the circumstances. Utah retains an interest in preventing the reception of offending emails by its citizens, Fenn does have an economic interest and would have no recourse should the matter be dismissed. Furthermore, the important substantive social policies of protecting Utah's citizens from spam together with the other factors continue to outweigh any burden imposed upon MLeads for having sent the email. Utah had the right to protect its citizens, just as numerous other states did. Until the federal government stepped in to protect everyone in the nation, the states had authority (and certainly Utah had authority) to prevent this imposition upon its citizens.

CONCLUSION

Pursuant to the foregoing arguments and law, Appellee respectfully requests this Court deny Appellants' request for reversal of the decision by the Court of Appeals as the decision made by this State's Court of Appeals is well reasoned and founded upon firm basis in the law.

DATED this 3 day of June, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that I served two true and correct copies of the foregoing **APPELLEE'S OPPOSITION TO APPELLANTS' OPENING BRIEF**, via first class mail, postage prepaid, on the following:

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